

No. 55418-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM F. JENSEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard A. Jones

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
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2006 JUL 28 PM 4:53

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STATE OF WASHINGTON

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A. ARGUMENT

1. THE FACT THE PROSECUTOR'S REMARK WAS CONSTITUTED A PORTION OF THE PROSECUTOR'S CLOSING ARGUMENT IS OF NO MOMENT

Mr. Jensen contended in his opening brief that comments made by the prosecuting attorney in closing argument improperly impugned defense counsel, and thus imputing guilt to him, violated his constitutionally protected rights to due process and a fair trial. In response, the State contends the comments were a mere portion of the prosecuting attorney's overall remarks, which somehow makes a difference.

The fact the remarks were a portion of the argument should matter little. Impugning defense counsel with an eye towards imputing guilt to the defendant is improper and violates the defendant's right to due process. *See United States v. McDonald*, 620 F.2d 559, 564 (5th Cir.1980) ("No prosecutor, however, may impugn the integrity of a particular lawyer or that of lawyers in general, without basis in fact, as a means of imputing guilt to a defendant.").

Similarly, the State's argument that the harmless error standard under *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct.

824, 17 L.Ed.2d 705 (1967) is inapplicable even though the prosecutor's comment affected both Mr. Jensen's Fourteenth Amendment right to a fair trial and his Sixth Amendment right to counsel must, instead contending that the failure to seek a curative instruction rendered the error harmless, citing this Court's decision in *State v. Klok*, 99 Wn.App. 81, 992 P.2d 1039 (2000), must fail as well. Brief of Respondent at 14 fn.5. The issue of what harmless error standard was applicable to the infringement of a constitutional right during a prosecutor's closing argument was not before the Court in *Klok*. Instead, the sole issue before this Court was the proper standard for review on appeal where the defendant fails to object to the prosecutor's improper closing argument. *Klok*, 99 Wn.App. at 83-85.

Finally, the State's contention that a curative instruction would have remedied the error simply ignores reality. Claims regarding the use of curative instructions ignore the behavior of jurors and can lead to absurd results:

If juries could honestly be counted upon to literally construe and obey an instruction that closing arguments are "not evidence," and that their verdict is to be based solely on the evidence, it would make no sense for the jury to do anything but disregard closing arguments altogether. If that were the case it would be impossible to justify the Supreme Court's holding

that a criminal defendant has a constitutional right to give a closing argument. Nor could one possibly justify the rule that it may be reversible error to grant a jury's request to read back portions of the prosecutor's closing. It would also be absurd for attorneys to object at all to improper closings, although we insist that they do so, and redundant for judges to strike improper closing remarks. It would always be pointless for the prosecution to exercise its right to give a rebuttal argument because it would merely be responding to an argument that the jury had been told to disregard. And as one court of appeals has correctly noted, that logic, if taken seriously, "would permit any closing argument, no matter how egregious."

James Joseph Duane, *What Message Are We Sending To Criminal Jurors When We Ask Them To Send A Message With Their Verdict?* 22 Am. J. Crim. L. 565, 653-655 (1995) (internal footnotes omitted).

Finally, the prosecutor's argument cannot merely be forgotten or ignored by the jury during its deliberations, even in light of a curative instruction. "[A] bell once rung cannot be unring." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). This Court must reverse Mr. Jensen's convictions and remand for a new and fair trial which comports with due process.

2. MR. JENSEN'S RIGHT TO COUNSEL WAS VIOLATED AS THE UNDERCOVER OFFICER QUESTIONED MR. JENSEN ABOUT HIS RELATED DOMESTIC VIOLENCE CASE UPON WHICH THE RIGHT TO COUNSEL HAD ATTACHED

In his opening brief, Mr. Jensen submitted the State violated his Sixth Amendment right to counsel when it sent the undercover officer into jail and questioned him about his pending charges and related charges, thus requiring his tape recorded statements to be suppressed. The State has responded by contending Mr. Jensen's right to counsel had not yet attached to the solicitation charges. Brief of Respondent at 19.

Initially, the State contends the decision in *State v. Stewart*, 113 Wn.2d 462, 780 P.2d 844 (1989) controls this matter. Brief of Respondent at 20-21. The State is mistaken. In *Stewart*, the police officers interviewed the defendant on a completely unrelated offense. *Stewart*, 113 Wn.2d at 463-64. Here, the undercover officer questioned Mr. Jensen about not only the domestic violence charges for which he possessed the right to counsel, but also about the directly related charges of solicitation which arose from the domestic violence charges.

The United States Supreme Court's decision in *Maine v. Moulton*, provides the proper framework for the analysis in Mr. Jensen's case. The fact that the questioning of Mr. Moulton by the informant was on the pending charges was dispositive in the decision to suppress the defendant's statements to the informant. 474 U.S. 159, 177, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985) ("The police knew . . . that Moulton and [the informant] were meeting for the express purpose of discussing the *pending charges* . . .") (emphasis added)).

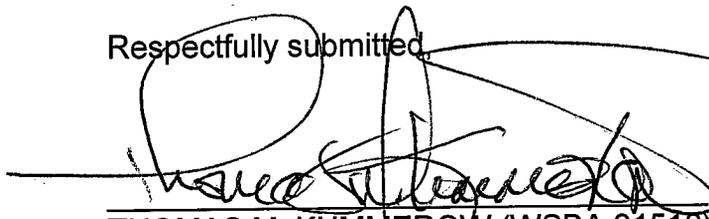
Since Officer Stevens' express purpose in meeting with Mr. Jensen was to discuss his pending charges and the related offenses of solicitation which grew directly from the domestic violence charges, Mr. Jensen's Sixth Amendment right to counsel was violated.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant as well as the Reply Brief of Appellant, Mr. Jensen submits this Court must reverse his convictions and remand for either a new trial or resentencing.

DATED this 28th day of July, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 28TH DAY OF JULY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | |
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| <input checked="" type="checkbox"/> KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
KING COUNTY COURTHOUSE
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<input type="checkbox"/> HAND DELIVERY
<input type="checkbox"/> _____ |
| <input checked="" type="checkbox"/> WILLIAM JENSEN
DOC# 877996
WASHINGTON STATE PENITENTIARY
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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JULY, 2006.

X _____ *grl*

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